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No. 265

In the Supreme Court of the United States

OCTOBER TERM, 1946

FRANK A. CARDILLO, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

LIBERTY MUTUAL INSURANCE COMPANY, E. C. ERNST, INC., AND VIRGINIA C. TICER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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The Solicitor General on behalf of Frank A. Cardillo, Deputy Commissioner, United States Employees' Compensation Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled case on April 8, 1946.

OPINIONS BELOW

The District Court of the United States for the District of Columbia did not render an opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 59–62) is reported at 154 F. 2d 529.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1946 (R. 63). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, upon review of an order of the Deputy Commissioner under the District of Columbia Workmen's Compensation Law (making applicable to the District of Columbia the basic federal Longshoremen's and Harbor Workers' Compensation Act) awarding compensation to the widow of a deceased employee, the court below erred in failing to accord finality to the Deputy Commissioner's finding that the employee's injury arose out of and in the course of his employment.

2. Whether, as a matter of law, an injury to an employee occurring while on his way home from work is not an injury arising out of and in the course of his employment, within the meaning of the District of Columbia Workmen's Compensation Law (making applicable to the District of Columbia the basic federal Longshoremen's and Harbor Workers' Compensation Act), where the employer has undertaken in the contract of employment to furnish transportation to and from work, but where he makes a per diem payment to the employee for transportation expense in lieu of actually supplying transportation.

STATUTES INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act (March 4, 1927, c. 509, 44 Stat. 1424, *et seq.*; 33 U. S. C. 901 *et seq.*), and of the Act of May 17, 1928 (45 Stat. 600, D. C. Code, 1940, Title 36, Chap. 5, § 1), hereinafter referred to as the District of Columbia Workmen's Compensation Law, are set forth in the Appendix, pp. 14–15, *infra*.

STATEMENT

On December 13, 1944, respondents, E. C. Ernst, Inc. (the "employer") and Liberty Mutual Insurance Company (the "insurance carrier") instituted this action in the District Court of the United States for the District of Columbia, to set aside an order issued under the District of Columbia Workmen's Compensation Law, awarding compensation to the claimant Virginia C. Ticer, a party hereto, as surviving spouse of one Clarence H. Ticer ("Ticer") (R. 2–10).

The Deputy Commissioner's findings (R. 7–10) in support of his order may be summarized as follows: Ticer, a resident of the District of Columbia, was hired as an electrician by E. C. Ernst, Inc., a contractor, engaged in electrical construction work in the District of Columbia and surrounding areas (R. 7–8). In November, 1940, the employer transferred Ticer from a construction project in the District of Columbia to a job at the Quantico Marine Base (R. 8). Under the

agreement between the Electrical Workers Union and the employer, it was provided that for all work outside the District of Columbia "transportation and any necessary expense, such as board and lodging, shall be furnished" by the employer (R. 8). The sum of $2.00 per day was fixed by the parties to the agreement as transportation expense, and represented the approximate cost of travel from the District of Columbia to the Marine Base and return (R. 8). This amount was paid to Ticer in addition to the regular hourly rate of pay, and was in lieu of the employer's supplying transportation (R. 8). As the Quantico job site was several miles away from the bus or train terminal, it was necessary for Ticer and his co-workers to drive their own automobiles to and from work (R. 8). The employees formed a car pool, and each morning they started from their homes in their own automobiles to a designated meeting place at Roaches Run, Virginia, and then would proceed in one car to the job site (R. 8–9). The workers alternated in the use of the cars for that part of the trip, nonmembers of the car pool each paying the car owner $1.00 for the round trip (R. 9). The employer was aware of the means of transportation being used, and acquiesced therein (R. 9). On December 13, 1943, while Ticer and four co-workers were riding in his car on a direct route from his place of employment to his home, an accident occurred near

Fort Belvoir, Virginia, causing his death on December 17, 1943 (R. 7, 9).

At the hearing before the Deputy Commissioner on a claim for compensation by Ticer's widow, the insurance carrier contended that the Virginia Compensation Commission had sole jurisdiction over the claim, that the claimant was not a "dependent widow" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, and that Ticer's injury "did not arise out of or in the course of employment" (R. 13–14). The Deputy Commissioner, however, ruled adversely to these contentions, and on July 21, 1944, issued his order awarding death benefits and funeral expenses to the claimant (R. 4, 10).

The employer and insurance carrier then filed their complaint (R. 2–6) in the District Court for review of the order, renewing their challenge to the Deputy Commissioner's jurisdiction, and alleging a want of substantial evidence to support the finding that Ticer's injury arose out of and in the course of his employment. Upon motions of the Deputy Commissioner and the claimant (R. 11–12), the District Court dismissed the complaint on the grounds that the Deputy Commissioner's findings were "supported by evidence in the record" and that the compensation order was "in all respects in accordance with law" (R. 12–13). On appeal, the court below reversed, Chief Justice Groner dissenting (R.

63). Without passing upon the jurisdiction of the Deputy Commissioner, the majority held that Ticer's injury had not arisen out of and in the course of his employment, since "the control of the employer" over Ticer's "acts and movements" ended "with the close of the work day at Quantico", thereby terminating the master and servant relationship (R. 62).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

1. In holding as a matter of law that an employee's injury cannot arise out of and in the course of his employment, if the injury occurs under circumstances where the employer lacks "control" over "the acts and movements of the employee."

2. In holding that Ticer's injury did not arise out of and in the course of his employment, and in refusing to accord finality to the Deputy Commissioner's finding in this regard.

3. In holding that the $2.00 transportation payment to Ticer was made pursuant to a "new contract" and not to the original employment contract.

4. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

This case presents questions of substantial importance in the administration of federal work-

men's compensation laws.[1] The decision below fails to give effect to applicable decisions of this Court as to the finality to be accorded administrative findings in compensation cases; in its substantive aspects, it is squarely in conflict with *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162; and it narrows, in an important aspect, the protection afforded by federal workmen's compensation laws against the hazards of employment. The substantive question presented—whether an injury to an employee occurring while on his way home from work is an injury arising out of and in the course of his employment where, under

[1] While the immediate statute involved is the District of Columbia Workmen's Compensation Law, that Law merely extends to the District of Columbia the basic federal statute, the Longshoremen's and Harbor Workers' Compensation Act (see Appendix, *infra*, p. 14). This circumstance was commented on in *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285, where the Court said:

> In the view that the case does not fall within Rule 38, the respondent opposed the issuance of a writ of certiorari. The objection might be valid if the statute were confined in its operation to the District of Columbia. We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District. The Longshoremen's and Harbor Workers' Compensation Act, however, is national in scope, and a decision with respect to its enforcement constitutes a precedent of general application. We therefore granted the writ because of the important question as to the effect of § 20 (d).

The basic Longshoremen's Act has also been extended to other areas by the Defense Bases Act of August 16, 1941 (Appendix, *infra*, pp. 15–16).

the contract of employment, the employer has undertaken to furnish transportation to and from work, but where, in lieu of actually supplying transportation, he makes a per diem payment to the employee for transportation expense—is, we are advised by the United States Employee's Compensation Commission, one of substantial importance in the field of workmen's compensation, for it is of a type which constantly arises in the administration of federal workmen's compensation laws.

1. The majority opinion below ignores the rule, repeatedly laid down by this Court, requiring that findings of fact made by the Deputy Commissioner as to whether an injury arose out of and in the course of employment must be regarded as conclusive if supported by evidence. *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, 166; *Del Vecchio* v. *Bowers*, 296 U. S. 280; *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 246. The court below was clearly in error, since without even referring to those limitations on the scope of judicial review, it embarked on an independent determination as to whether Ticer's injury arose out of and in the course of his employment. That was an issue left primarily to the Deputy Commissioner, whose findings of fact with respect thereto were final and conclusive, under the cases cited, because supported by evidence. Even if

the evidence permitted "an inference either way * * *, the Deputy Commissioner and he alone is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the court." *Del Vecchio* v. *Bowers*, 296 U. S. 280, 287. By disregarding those standards of judicial review, the decision of the court below strikes at the heart of the statutory plan for providing a "prompt" and "inexpensive" method for the disposal of workmen's compensation claims. *Crowell* v. *Benson*, 285 U. S. 22, 45–47.

Unquestionably there was ample evidence before the Deputy Commissioner to support his finding (R. 9) that Ticer's injury arose out of and in the course of his employment. The testimony showed conclusively that the transportation to and from work, in the circumstances of this case, was an incident of the employment. This appeared from the contract of employment itself under which the employer agreed with the employees that he would furnish transportation with respect to "all work outside the District of Columbia" (R. 53). Moreover, the exigencies of the employment were such, by reason of the location of the work, the hours of work, and the lack of transportation facilities, as to require as a practical matter that the employer make some arrangement for transportation if employees were to be ob-

tained for the job.[2] It is a fair inference that the $2.00 transportation payment was the employer's way of carrying out his undertaking to provide transportation. Even if "more than one possible conclusion could have been reached upon the evidence, we think it was clearly sufficient to support the Deputy Commissioner's finding that [Ticer] was acting in the course of his employment." *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 246.

The majority below, apparently making its own findings of fact, held that the original agreement to furnish transportation "was not followed by the parties with respect to the work at Quantico" and that a "new" oral contract to pay the transportation expenses supplanted the written agreement (R. 61). Certainly the record compelled no such conclusion, for it is reasonable to infer, as the Deputy Commissioner apparently did, that the oral arrangement for paying the employees $2.00 per day for transportation was merely the implementation of the agreement to furnish transpor-

[2] The evidence shows that the employees generally worked from 7:30 A. M. until 4:30 P. M. (R. 40). Although there was train and bus service to a place called Triangle, near Quantico, there was no such service to Quantico proper (R. 38, 39), and in order to use public transportation, it would have been necessary for employees to arise at 4 o'clock in the morning (R. 27, 28), and then walk two to four miles at the Quantico end (R. 39). No transportation to the job site was available (R. 38). The need for skilled men at Quantico was such that apparently the contractors would have paid Ticer $5.00 to get him to work (R. 27, 28).

tation. Especially is this true in view of the unchallenged basic findings of the Deputy Commissioner that the $2.00 per day represented the approximate cost of travel from Washington, D. C., to the Quantico Marine Base and return, and that the job site at Quantico was several miles away from the bus or train terminal (R. 8). Furthermore, since the written employment contract was renewed from time to time without change in the transportation provision, even though the same manner of implementation was being followed (R. 23, 24), it is likewise reasonable to infer that, over the 10- to 15-year period, the payment of the transportation expense was not a mere substitution of or variation from the contract, but was the carrying out of the contract itself; otherwise, the written contract provision undoubtedly would have been changed to accord with the substitute.

2. The majority below was equally in error in holding, as a matter of law, that, as a condition precedent to liability for compensation in a "transportation" case, the employer must have "control" over the "acts and movements" of the employee during the transportation (R. 62). On this point the decision below is squarely in conflict with *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, where this Court sustained a finding by the Deputy Commissioner that the employee's injury was compensable, even though the injury occurred

while the employee was driving his own automobile and while he was on his way to the employer's place of business. Under the *Voehl* case, the test to be applied is whether, as a part of the contract of employment, the employer agreed to furnish transportation to and from work—the means being unimportant; and where there is such agreement, whether expressed or implied, the transportation becomes an incident of the employment and injuries occurring during the course of transportation are considered to arise out of and in the course of the employment. As this Court stated in the *Voehl* case (288 U. S. at 169–170): "While service on regular hours at a stated place generally begins at that place, there is always room for agreement by which the service may be taken to begin earlier or elsewhere"; the employer may agree "that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return", and in such case "the hazards of the journey may properly be regarded as hazards of the service and hence within the purview of the Compensation Act." Nowhere did this Court suggest any rule of law making "control" by the employer a prerequisite to finding an injury to have arisen out of and in the course of employment; and in other jurisdictions the cases are legion in which injuries have been held compensable in "transportation" cases, although the employer could not have had

any real or substantial control over either the employee or the means of transportation.[8]

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

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[8] See, *e. g.*, *Liberty Mutual Ins. Co.* v. *Gray*, 137 F. 2d 926 (C. C. A. 9); *Lehigh Nav. Coal Co.* v. *McGonnell*, 120 N. J. L. 428, affirmed, 121 N. J. L. 583; *Williams* v. *Travelers Ins. Co.*, 19 So. 2d 586 (La. App.); *Swanson* v. *Latham*, 92 Conn. 87; *Turner Day & Woolworth Handle Co.* v. *Pennington*, 250 Ky. 433. Numerous cases are collected in 85 A. L. R. 978 and 96 A. L. R. 467.

APPENDIX

1. The Act of May 17, 1928 (District of Columbia Workmen's Compensation Law) (c. 612, 45 Stat. 600, D. C. Code, 1940, Title 36, c. 5, § 1) provides in part:

> SEC. 1—The provisions of the Act entitled "Longshoremen's and Harbor Workers' Compensation Act," approved March 4, 1927, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

2. The Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424, 33 U. S. C. 901 *et seq.*) provides in part:

> SEC. 2. DEFINITIONS.—When used in this Act—
>
> * * * * * *
>
> (2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such

accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * * *

SEC. 3. COVERAGE—(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

* * * * * *

SEC. 21. REVIEW OF COMPENSATION ORDERS—

* * * * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). * * *

3. The Act of August 16, 1941 (Defense Bases Act) (c. 357, 55 Stat. 622, 42 U. S. C., Supp. IV, 1651 *et seq.*) provides in part:

Except as herein modified, the provisions of the Act entitled "Longshoremen's and Harbor Workers' Compensation Act," approved March 4, 1927 (44 Stat. 1424), as

amended, and as the same may be amended hereafter, shall apply in respect to the injury or death of any employee engaged in any employment at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government or any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone, irrespective of the place where the injury or death occurs.

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